

THIRTEENTH JUDICIAL DISTRICT COURT  
COUNTY OF SANDOVAL  
STATE OF NEW MEXICO

FILED CLERK'S OFFICE  
DISTRICT CLERK

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JAMES M. PALENICK,  
  
Plaintiff,

FILED CLERK'S OFFICE  
BY DEPUTY  
SANDOVAL COUNTY

vs.

No. D-1329-CV-08-089

CITY OF RIO RANCHO,  
a political subdivision  
of the State of New Mexico,

Defendant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All requested Findings of Fact and Conclusions of Law are denied except such as are incorporated herein by the Court.

THE COURT NOW MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

**FINDINGS OF FACT**

1. Plaintiff James M. Palenick (hereinafter "Palenick") entered into a written Employment Agreement with defendant City of Rio Rancho (hereinafter "City") on November 8, 2006 concerning Palenick's employment as City Manager.
2. The Employment Agreement states that Palenick served at the pleasure of the City's Governing Body and that the Employment Agreement could be terminated by the Governing Body with or without cause.
3. The Employment Agreement further provides in Section 3(C) that if the Governing Body terminated Palenick without just cause, he would be entitled to receive

specified severance benefits, including cash payment calculated based on Palenick's years of service.

4. At the meeting of the Governing Body conducted on December 13, 2006 the Governing Body voted to terminate Palenick's employment without specification of just cause.

5. Palenick was present at the December 13, 2006 meeting. He immediately concluded that the vote had been taken in violation of the New Mexico Open Meetings Act.

6. On December 14, 2006 Palenick demanded in writing that the City pay him the severance benefits specified by Section 3(C) of the Employment Agreement because the Governing Body had taken action to remove him.

7. Palenick's written demand for severance dated December 14, 2006 did not advise the City that Palenick believed that the vote to terminate his employment had been taken in violation of the Open Meetings Act nor did it reserve any rights whereby Palenick could later sue the City based on alleged Open Meetings Act violations.

8. Palenick wrote the City again on December 21, 2006 to clarify his demand for severance. This letter also failed to advise the City that Palenick believed that the vote to terminate his employment had been taken in violation of the Open Meetings Act nor did it reserve any rights whereby Palenick could later sue the City based on alleged Open Meetings Act violations.

9. On December 27, 2006 the City's Human Resources Department Manager wrote to Palenick concerning his severance benefits and confirmed that "effective December 13, 2006 you will no longer be considered and active employee."

10. Palenick did not object to any statements in the City's December 27, 2006 letter.

11. Palenick received all severance benefits to which he was entitled under the terms of his Employment Agreement.

12. The Employment Agreement allowed Palenick to take other work.

13. Palenick became the City Manager of Gastonia, North Carolina on August 1, 2007.

14. Shortly after August 1, 2007 the City learned that Palenick had become City Manager of Gastonia, North Carolina.

15. The City never objected to Palenick taking the job as City Manager of Gastonia, North Carolina.

16. The opinion of the Attorney General is that the Open Meetings Act was violated by the City's Governing Body due to prior discussions of Palenick's employment status which invalidated the action by the Governing Body to terminate Palenick at the meeting on December 13, 2006.

17. On November 14, 2007 the City's Governing Body adopted Resolution No. 99 to address the Attorney General's concerns about the Governing Body's action on December 13, 2006 terminating Palenick.

18. On August 7, 2008 at a Summary Judgment hearing this Court found that any violations of the Open Meetings Act which had occurred on December 13, 2006 had been cured at the November 14, 2007 meeting and the issue for trial was whether the cure was retroactive to December 13, 2006.

19. Resolution No. 99 states, in part, that "If at all relevant, any and all prior action undertaken in terminating Mr. Palenick's employment with the City and set forth in writing are hereby ratified and approved."

20. By adopting Resolution No. 99 the Governing Body intended to ratify and approve its prior action terminating Palenick's employment effective December 13, 2006.

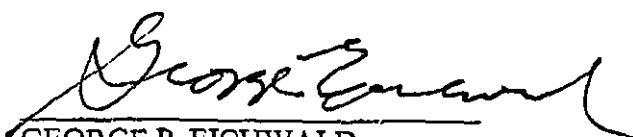
#### CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of this action.
2. The City's action resulting from the December 13, 2006 meeting concerning Palenick's termination was in violation of the Open Meetings Act. The purpose of the Act is to "open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." Gutierrez v. City of Albuquerque, 96 N.M. 398, 400, 631 P.2d 304, 306 (1981) (citing Karol v. Board of Educ. Trustees, Etc., 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979)).
3. The adoption of Resolution No. 99 by the City's Governing Body on November 14, 2007 retroactively ratified, rectified, and approved its prior action on December 13, 2006 terminating Palenick's employment and cured any alleged violations of the Open Meetings Act. "Procedural defects in the Open Meetings Act may be cured by taking prompt corrective action." Kleinberg v. Board of Educ. Of Albuquerque Public Schools, 107 N.M.38, 751 P.2d 722 (Ct. App. 1988) (citing Board of Educ. of Santa Fe Public Schools v. Sullivan, 106 N.M. 125, 740 P.2d 119 (1987)).
4. Palenick elected to receive severance benefits when terminated without cause under the Employment Agreement. Palenick's election to proceed with his demand

for severance is a waiver of any and all rights to claim a breach of the Employment Agreement based on violations of the Open Meetings Act.

IT IS THEREFORE ORDERED THAT:

1. The Order entered on April 27, 2009 dismissing Count One of Palenick's complaint with prejudice is confirmed and made final.
2. Count Two of Palenick's complaint is dismissed with prejudice.
3. The City's counterclaim is deemed moot and is dismissed with prejudice.
4. The parties will bear their own costs and attorney's fees.

  
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GEORGE P. EICHWALD  
District Judge

**CASE DISPOSITION**

Code: 4V